No. 11,239

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOE FONTES, individually and doing business as Joe Fontes Machinery Company, Ltd.,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

I.

JURISDICTION.

The Price Administrator instituted this suit in the District Court pursuant to Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong., 2nd Sess., c. 26, 50 U.S.C.A., 901 et seq.) as amended, hereinafter called the "Act," claiming the violation by defendant of Maximum Price Regulation 1, as amended—Used Machine Tools—effective in accordance with the provisions of the Act; and pursuant

to Section 205(a) of the Act and brought the action to enforce compliance with said Regulation (R-2). An injunction was prayed for but not granted.

Jurisdiction of the District Court was properly exercised under Section 205(c) of the Act.

The judgment of the District Court was entered September 8, 1945 (R-34). Notice of appeal was filed October 5, 1945 (R-34). This Court has jurisdiction of the appeal by virtue of Section 128 of the Judicial Code. (28 U.S.C., Sec. 225, 36 Stat. 1134.)

II.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED ON APPEAL.

A. Statement of the Case.

At all times involved appellant was engaged in selling and offering to sell used machine tools in the City and County of San Francisco, State of California. On April 6, 1944, appellant received an order from a customer for one 13″ x 6″ Sebastian Geared Head, Quick Change Lathe and one chuck. Appellant was not in actual possession of the said lathe at the time of the order therefor, but same was inventoried in his shop April 17, 1944. The lathe was orally guaranteed by appellant, and, purchased by the customer as so guaranteed. Appellant had instructed the employee handling such transactions or sales to write the words "as is" or "guaranteed", as the case might be, on all invoices. The employee neglected to endorse the word

"guaranteed" on the order for this particular lathe. There is no evidence of any invoice having been issued. Defendant has complied with all provisions of the Act and all Regulations issued in pursuance thereof with the exception of this single instance. After sale and delivery, the lathe was serviced without charge as is the trade usage on a rebuilt and guaranteed tool.

On the day after the lathe was inventoried as being in possession of appellant, appellant made a written report of the sale of said tool (Defendant's Exhibit "A" R-22) to the Administrator as having been sold as a "rebuilt and guaranteed machine". When the attention of appellant was called to this single omission of his employee, appellant, at the suggestion of the agent or representative of the Price Administrator, reprinted his forms so that the same mistake could not occur again. (Defendant's Exhibit "B" R-23.)

The whole case is based upon the alleged failure to give a written guarantee. The objection runs to the procedure involved rather than to the price charged. Had the guarantee been written instead of oral, there would have been no complaint. In other words, the price charged was right.

The Court rendered a judgment against appellant for treble damages.

B. Questions Involved on Appeal.

The questions involved on this appeal are:

1. Before the plaintiff Administrator could recover a judgment, must there not be both proof and a find-

ing that the lathe was purchased for use or consumption in the course of trade or business of the buyer? Must not the Administrator bring his case within the provisions of Section 205-e of the Act?

2. Should appellant, who acted in good faith and did everything a reasonable man could do to comply with the Act and Regulations, who actually did not sell above the legal price and who immediately reported in writing the lathe as having been sold as a rebuilt and guaranteed tool and who actually serviced the lathe without charge as is customary in the sale of guaranteed machine tools, be penalized or, in fact, suffer any judgment against him because of the failure of an employee to write the word "guaranteed" on the purchase order despite explicit instructions by appellant to do so?

3. How could the Court find (R-29) that the lathe was not rebuilt by appellant within the meaning of that term as used in Section 3(c) of said Maximum Price Regulation No. 1 when there was no evidence as to whether or not the machine was rebuilt?

4. How could the Court find that the lathe "was not invoiced" as such when there was no evidence that there was or was not an invoice?

III.

SPECIFICATIONS OF ERROR.

Appellant specifies the following errors upon which he relies in the prosecution of this appeal.

1. The Court erred in giving any judgment in favor of the Administrator.

2. The Court erred in rendering judgment against appellant in the sum of $927.25 three times the amount of $324.75, the latter sum being claimed the amount of the overcharge for the lathe.

3. The Court erred in finding that the said lathe was not rebuilt within the meaning of the term as used in the Regulation.

4. The Court erred in finding that the lathe was not invoiced as rebuilt.

5. The Administrator was not entitled to a judgment because there was a failure to produce any evidence that the lathe was purchased for use or consumption in the course of trade or business of the buyer.

6. The Administrator was not entitled to a judgment because there was a failure to make a finding to the effect that the lathe was purchased for use or consumption in the course of trade or business of the buyer.

IV.

SUMMARY OF ARGUMENT.

Before the Administrator could have recovered a judgment in this case he should have presented proof that the lathe was purchased for use or consumption in the course of trade or business of the buyer. There must likewise be a finding as to this.

Appellant, in the conduct of his business, has complied with the Act and all Regulations issued in regard thereto. There is no evidence of the absence of good faith. Appellant has been penalized for an act of omission upon the part of an employee contrary to expressed instructions. It is contended that it was not contemplated by the Congress of the United States that one should suffer a judgment or be penalized unless there was a deliberate act of omission or some intent to deceive, defraud or to evade or unless there was an actual overcharge. Certainly, it could not have been the intention to penalize one for a ministerial error when the price itself was right. The evidence is that the lathe was guaranteed, that appellant believed all regulations had been complied with and actually serviced the lathe after the sale as is customary in the case of guaranteed tools. Furthermore, appellant, the very next day after the machine was inventoried as being in his shop, reported the sale to the Price Administrator as a sale of a rebuilt and guaranteed tool. No judgment should have been rendered against him. The full spirit of the law was obeyed. The purchaser suffered no loss and the appellant had no illegal profit.

As the price was correct, the public suffered no wrong or damage.

The Court made findings which are not supported by the evidence. The Court found that the lathe was not rebuilt. How could the Court make this finding? There is not a scintilla of evidence on that subject.

The Court found that the lathe was not invoiced as a rebuilt and guaranteed machine. This finding is erroneous as there is no evidence as to whether or not there was any invoice.

It is elementary that the burden of proof is upon the plaintiff to prove his case. This is especially true in cases involving penalties or in statutes of a penal nature. The appellee in this case, failed to make sufficient proof. Important elements of his case are missing. Furthermore, neither the evidence nor the findings show a right of action in favor of the Administrator.

V.

ARGUMENT.

A. THE PURPOSES OF THE ACT WERE FULFILLED.

What was the purpose of the Act as applied to this particular transaction? The Act was passed, among other reasons "to stabilize prices and to prevent speculative, unwarranted and abnormal increases in prices" etc. (50 U.S.C.A., Sec. 901.) In the case now before the Court there was no excessive price. The price charged was the proper price for a rebuilt

and guaranteed tool, which it was. The sole point was the failure of an employee to write the word "guaranteed". The machine, in fact, was guaranteed and so accepted by the buyer. The price charged was proper for such a tool. The purposes of the Act were fulfilled.

B. THERE WAS AN ABSOLUTE FAILURE OF THE EVIDENCE TO SHOW ANY RIGHT IN THE ADMINISTRATOR TO BRING THIS ACTION.

Section 205-e of the Act reads in part as follows:

> "If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or prices, the person who buys such commodity for use or consumption other than in the course of trade or business, may bring an action either for $50.00 or for treble the amount by which the consideration exceeded the applicable maximum price whichever is greater." * * *
>
> "If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices and the buyer is not entitled to bring suit or action under this Section, the Administrator may bring such action." * * *
>
> *Emergency Price Control Act of 1942*, 56 United States Statutes at Large, p. 23, 50 U.S.C.A., Sec. 901.

There is no evidence on this subject whatsoever. In other words, there was no evidence showing the pur-

pose for which the tool was purchased. Furthermore, there was no finding as to the purpose for which the tool was purchased and, therefore, both evidence and findings fail to show any right in the Administrator to bring the action. The evidence and the findings should both show that the buyer was not entitled to bring the action.

Even if facts are agreed to by the parties the Court is not relieved from making findings on all material matters upon which the judgment is to be predicated.

> "The circuit court of appeals is, of course, not bound by findings which are conclusions of law rather than of fact, and accordingly findings based on facts which are not in dispute, or which are agreed to by the parties, present questions of law proper for the determination of the appellate court unhampered by the trial court's conclusions. So also the appellate court will always review to determine whether the findings made support the judgment rendered, or the ultimate conclusion drawn; and it may also pass on the propriety of conclusions or ultimate findings of fact which have been reached by way of deduction or inference from probative or subordinate facts."
>
> 36 *Corpus Juris Secundum,* p. 414.

Generally speaking there must be evidence to support any finding made by the Court.

> "There is a total lack of evidence or stipulation to support the findings made by the trial court. We deem it unnecessary to consider the other points raised by appellants.

The judgment is reversed."

Motion Pict. Assn. v. Assoc. Artists, 11 Cal. App. (2d) 320, 321.

The following language is adopted by the Court in the case of *Bowles v. Whayne* (60 F. Supp. 78):

"Where a retailer sells to a purchaser for use or consumption, the purchaser can sue for the damage authorized by the Act, but where a wholesaler sells to a retailer who buys for resale in the course of trade or business and not for use or consumption, such retailer has no authority to institute the suit but the right of action in such cases is vested in the Administrator."

Naturally, the reverse is true.

C. FINDINGS SHOULD BE MADE ON ALL MATTERS UPON WHICH THE JUDGMENT IS PREDICATED.

Rule 52 of the Rules of Civil Procedure for the District Courts of the United States reads as follows:

"(a) *Effect.* In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard

shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

D. APPELLANT SHOWED THE UTMOST GOOD FAITH.

While it is true that in cases of price violation, good faith is not an issue or perhaps material, yet, in this case where there was no actual price violation and where the purposes of the Statute have been complied with, good faith should be material. The good faith of appellant appears throughout the record. The findings of the trial judge are enlightening. Four of the findings are quoted:

X.

"That the defendant has not engaged in any actions or practices which constitute a violation

of Section 4(a) of the Emergency Price Control Act of 1942 other than in connection with the sale of the one machine tool described in these Findings." (R-30.)

XI.

"There is no evidence that the defendant violated the regulation in that he sold and offered to sell second hand machines and parts (31) without following the pricing practices as required by Section 1390.11 of the Regulation, except for the sale of the one machine tool hereinabove described." (R-30 & 31.)

XIII.

"That prior to the trial of this action the defendant, in consultation with and at the consent of agents of the plaintiff and of the Office of Price Administration, adopted and is using now in his business a form of invoice and written guarantee approved by the agents of the plaintiff and of the Office of Price Administration to obviate any further violations." (R-31.)

XIV.

"That there is no evidence that the defendant has violated the Regulations in any respect except in the one instance in the sale of the one machine tool, and there is no evidence that the defendant has threatened to or intends or will in the future violate the regulations of the plaintiff or of the Office of Price Administration." (R-31.)

The new form referred to in Finding XIII, quoted above contains the following language:

> "All machine tools above described are equivalent to rebuilt and are guaranteed in accordance with OPA regulations unless otherwise specified 'as is'." (R-23.)

E. WHILE THERE WAS NO WRITTEN GUARANTEE THERE WAS WRITTEN AND ORAL EVIDENCE THAT THE TOOL WAS REBUILT AND GUARANTEED.

Appellant relies upon the facts, the evidence, elementary rules of law and the rules of the Court.

The judgment was rendered against appellant upon the stated ground that there was no written guarantee. What is the purpose of a written guarantee or of a writing of any kind?

The purpose is simply to furnish evidence of an intent or agreement. The writing is evidence in the event of a dispute. In this case there actually was a writing, defendant's Exhibit "A" (R-22) being a report made to the Price Administrator by appellant entitled "Secondhand Machine Tool Report". Item 7 thereof reported the sale of the lathe as a rebuilt and guaranteed sale (R-21 & 22), as appellant reported in writing that the lathe was sold as a rebuilt and guaranteed machine, he was bound thereby. The purpose of the Regulations was accomplished. Had appellant repudiated his guarantee, the purchaser could have sued upon appellant's written statement in the report. No other evidence would be neces-

sary. In this instance, no one was harmed or could be harmed by the failure of the employee of appellant, despite explicit instructions to do so, to write the word "guaranteed" on the purchase order. That the employee was so instructed is clear from the evidence.

> "Q. Did you instruct your employees, particularly Mr. Peabody (21) to make any notations on invoices as to whether or not the machine tool was 'as is' or guaranteed?
>
> A. Yes, I did.
>
> Q. What—
>
> A. I have told them all to make sure." (R. 20.)

That appellant orally guaranteed the lathe is undisputed.

> "The Witness. In my transaction with the Montybex Company, when I brought that lathe up from Los Angeles, we made a guarantee to the Montybex Company that that lathe was guaranteed to be in first class working condition throughout, and if it was not satisfactory they could return it to us." (R-13) * * *
>
> "Well, Mr. Montybex said it would be all right if I would guarantee the lathe he would place the order." (R-14.)

That the machine was bought by the purchaser as guaranteed is also undisputed.

> "Q. Was this machine sold to you by the defendant in this action as a guaranteed or as an 'as is' machine?
>
> A. Guaranteed." (R-24.)

The use of the word "invoice" in the testimony is misleading. The "invoice" referred to in the testimony was not an invoice but a purchase order signed by the purchaser. The document referred to as the "invoice" was the sole exhibit offered by appellee. It is plaintiff's exhibit No. 1. (R-16.) An inspection of this exhibit shows that it is not an invoice but an order for the lathe signed by the purchaser. Nowhere in the Regulations is it required that the purchaser should put the words "rebuilt and guaranteed" or "rebuilt or guaranteed" on a purchase order.

F. OTHER FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

Despite the fact that there was no evidence offered as to whether or not the lathe was a rebuilt machine or not a rebuilt machine or whether the lathe was invoiced as a rebuilt machine, the Court made the following findings:

V.

> "That at the time of the sale and delivery of the said lathe the same was not rebuilt by the defendant within the meaning of that term as used in Section 3-(c) of said Maximum Price Regulation No. 1, and was not invoiced as such, and that no binding written guarantee (30) of satisfactory performance for a period of not less than thirty days from the date of shipment, or no written guarantee of any kind guaranteeing performance for any number of days from date

of shipment, was executed and delivered by the defendant to the purchaser of said lathe." (R-29.)

There is absolutely no evidence to support this finding and therefore the same was error.

The Court also found in Finding III (R-28 & 29) that the lathe and chuck "was a second hand machine tool". There is nothing in the evidence to support this finding except the exhibits themselves. Now then, if this finding must rely for support upon the exhibits, why could not a finding have been made that the machine was sold as a rebuilt and guaranteed machine in view of the fact, that the exhibits, especially defendant's Exhibit "A", Item 7 thereof, reports the sale of the said lathe as that of a "rebuilt and guaranteed" lathe. (R-22.)

G. PLAINTIFF HAD THE BURDEN OF PROOF.

It is elementary that the plaintiff has the burden of proof. It is incumbent upon him to prove his case. Appellee has failed in this regard. His primary failure was to prove his right to bring the action.

VI.

CONCLUSION.

It is elementary that the plaintiff has the burden of proof. Appellee in this case has failed in his proof. Primarily he has failed to show any right to

bring this action. He could only bring the action in the event that the buyer could not. He has failed to offer any proof to support his right to maintain the action.

It is respectfully submitted that appellant has shown the highest good faith throughout the conduct of his business as shown in the Record and that the omission on the part of an instructed employee to write the word "guaranteed" on a purchase order does not warrant a judgment on appellant. It is also respectfully submitted that the Act being penal in its nature, a strict compliance with the rules of pleading and evidence should be compulsory.

It is also respectfully submitted that the evidence does not support the findings and for that additional reason, the judgment should be reversed.

It is respectfully submitted that the judgment of the District Court awarding appellee the sum of $974.25 should be reversed.

Dated, San Francisco, California,
March 27, 1946.

Waldo F. Postel,
Attorney for Appellant.